On September 1, 2005, the Seventh Circuit upheld Loren-Maltese's conviction but remanded for resentencing, which is tentatively scheduled for January 23, 2006.

STATEMENT OF THE FACTS

Petitioner Betty Loren-Maltese is a former President of the Town of Cicero (the "Town"). This case involved a fraud committed against the Town by Specialty Risk Consultants ("SRC"), the brainchild of co-defendants Michael Spano, Sr. and Frank LaGiglio. The Town of Cicero is self-insured – it provides for the health insurance of its employees through its own funds and uses a third-party administrator to process claims. In 1992, the Town retained SRC to handle the Town's health insurance. (T176-77,319-22) Over the next four years, SRC converted millions of dollars of the Town funds intended to cover health insurance claims.

In 1992, when SRC was retained, Betty Loren-Maltese held a minor position with the Town. Henry Klosak was then Town President. (T233-34) His friend, Frank Maltese, was the Republican committeeman and a Town Trustee. Loren-Maltese, who had been a realtor, married Frank in 1988. (T233-34, 439-41,644-47)

Klosak died in December, 1992, and Frank Maltese recommended that his wife be appointed interim President. In January, 1993, the Board appointed Loren-Maltese as President. Frank Maltese died of cancer in October, 1993. (T442-49,563-65,648-50,3041)

In 1992, LaGiglio approached Frank Taylor, the government's key cooperating witness, about forming SRC, an insurance company that would be funded by Spano, Sr. and that could secure the Town's insurance business. (T576,579,1282-1301) Once SRC took over, it immediately began diverting money for its personal use. About 90% of SRC's money came

from the Town. (T349-66,408-16,1304-06,1457,1577,1978-80,3268) SRC transferred Town money to a company that it employed to purchase and renovate a golf course; to pay for expenses for LaGiglio's interest in a horse farm; to build Spano, Sr. a summer home; and for personal expenses of Taylor and other SRC defendants. (T1476-80,1531,1555-77,3281,3359-88,4660) **No money went to Loren-Maltese.**

No one testified that Loren-Maltese was involved in the decision to form SRC or in any of SRC's activities. There was no evidence that Loren-Maltese was ever told about a fraud; to the contrary, several government witnesses acknowledged that SRC sent the Town documentation that was designed to make their expenses appear legitimate, and that Loren-Maltese was placated with assurances that the rising insurance costs were attributable to an increase in insurance claims and to arrearages. (T1894-98,2314,2336,3026-28,3047,3828-33,6110-11)

The government acknowledged that it had no evidence that Loren-Maltese ever took a bribe, but argued that she nonetheless benefitted from SRC's scheme because she received 100% coverage of her health insurance claims, sometimes on an accelerated basis. The evidence established, however, that although the Town's health insurance Plan provided for each participant to be paid 80% of covered claims, numerous key Town employees, including employees who were not defendants in this case, historically had received accelerated reimbursement of 100% payment of their claims. Several witnesses testified that this exception was permitted under the Plan if there was proper documentation of the request for a non-contract payment. **More importantly, this practice existed well before SRC took over and well before Loren-Maltese became Town President.** (T353-61,373,387-91,552,2331-32,2427-28,2466-75,2592-94,5198-99,5253)

In October, 1996, the media reported a federal investigation of SRC and the Town's insurance program. Shortly

thereafter, Loren-Maltese asked that all payments to SRC be stopped unless they were reviewed by and received Board approval. (T680-81)

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE "HONEST SERVICES" STATUTE IS UNCONSTITUTIONALLY VAGUE AND TO RESOLVE A CONFLICT IN THE CIRCUITS OVER HOW TO INTERPRET THE STATUTE SO THAT IT COMPLIES WITH DUE PROCESS

Nearly twenty years ago, in McNally v. United States, 483 U.S. 350 (1987), this Court invalidated the judicially-created "intangible rights" doctrine of mail/wire fraud. The Court held that the mail and wire fraud statutes, 18 U.S.C. §§1341 and 1343, were limited to the protection of property rights, and that the "intangible right of the citizenry to good government" did not constitute a cognizable property right. Id. at 356. The Court concluded that, "if Congress desires to go further, it must speak more clearly than it has." Id. at 360.

Congress quickly responded by enacting 18 U.S.C. §1346, which defines a "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services."[1] Unfortunately, Congress did not "speak more clearly," failing to define "honest services" and leaving it to the courts to interpret and implement the statute. As a result,

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[1] Section 1346 was added as a last-minute amendment to the Anti-Drug Abuse Act of 1988; apparently, Congress's purpose was to overrule McNally. 134 Cong. Rec. H11251 (daily ed. Oct. 21, 1988); Cong. Rec. S17376 (daily ed. Nov. 10, 1988).

questions about the statute's meaning persist, among them: whether the statute applies to all fiduciaries or to public officials only; whether the victim can be a locality and its citizenry; whether the public official must be shown to have violated state law; and whether an ethical breach, standing alone, can constitute a federal crime.

Several Circuits have held that the statute is not so vague that it violates due process. See, e.g., United States v. Rybicki, 354 F.3d 124 (2d Cir. 2003) (en banc), cert. denied, 125 S.Ct. 32 (2004); United States v. Brumley, 116 F.3d 728 (5th Cir.) (en banc), cert. denied, 522 U.S. 1028 (1997); United States v. Welch, 327 F.3d 1081 (10th Cir. 2003); United States v. Gray, 96 F.3d 769 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997); United States v. Waymer, 55 F.3d 564 (11th Cir. 1995), cert. denied, 517 U.S. 1119 (1996); United States v. Burgos, 55 F.3d 933 (4th Cir. 1995).

Yet, despite what might appear to be a consensus, there is palpable discontent with the statute's ambiguity even among courts that have upheld its constitutionality. The First Circuit has remarked that the concept of honest services "eludes easy definition." United States v. Sawyer, 85 F.3d 713, 724 (1st Cir. 1996). The Second Circuit, in its deeply divided *en banc* decision upholding the statute, conceded it would have to "labor long and with difficulty in seeking a clear and properly limited meaning" of a scheme to defraud another of the intangible right to honest services. Rybicki, 354 F.3d at 135. The Seventh Circuit (although it avoided discussion of the constitutional issue in this case) has frequently criticized the statute's imprecision. United States v. Martin, 195 F.3d 961, 967 (7th Cir. 1999), cert. denied, 530 U.S. 1263 (2000) (noting "persistent concerns about the breadth and vagueness of the statute"); United States v. Hausmann, 345 F.3d 952, 956 (7th Cir. 2003), cert. denied, 541 U.S. 1072 (2004) (reiterating "doubts" about the statute's applicability to a breach of fiduciary duty "with nothing more").

Dissatisfaction with the statute has led to intra-Circuit conflict, with a substantial body of dissenting law arguing that the statute cannot pass constitutional muster. In Rybicki, four Judges of the Second Circuit dissented from the decision upholding the statute's constitutionality, noting that the courts have been unable to agree on the parameters of the statute and concluding that the "vagueness of the statute has induced court after court to undertake a rescue operation by fashioning something that (if enacted) would withstand a vagueness challenge." 354 F.3d at 163 (Jacobs, Walker, CJ., Cabranes and B.D. Parker, J., dissenting). The dissenters catalogued the "wide disagreement" among the lower courts on such fundamental questions as: (a) whether the defendant must cause actual harm; (b) what *mens rea* must be proved; (c) what duty must be breached; (d) whether the source of the duty is state or federal law; and (e) whether §1346 revived pre-McNally case law. Id. at 162-63.[2]

Likewise, in Brumley, three members of the Fifth Circuit concluded that the statute was unconstitutional when applied to a politician's deprivation of the "honest services" owed to his constituency. Among other defects, the dissenting Judges noted that the statute fails to give adequate notice of what conduct is prohibited and, by its terms, does not apply when the defrauded party is a political entity or its citizenry. 116 F.3d at 742-47 (Jolly, Moss & Smith, JJ., dissenting). The dissenting Judges were particularly critical of the fundamental premise that

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[2] Earlier, in United States v. Handakas, 286 F.3d 92, 104 (2d Cir.), cert. denied, 537 U.S. 894 (2002), a panel of the Second Circuit had held the statute unconstitutional as applied to a defendant convicted of depriving a state agency of its "intangible right of honest services" based on his violation of a state-required contract provision, and criticized the statute for providing "no clue to the public or the courts as to what conduct is prohibited."

"Congress can delegate to the federal courts the task of defining the key terms and coverage of a criminal statute." Id. at 746.

The Circuits are "fractured on the basic issues," both in the private and public context. Rybicki, 354 F.3d at 163 (Jacobs, J., dissenting).[3] In the context of a private employer/employee relationship, the Second Circuit has required proof of a material misrepresentation or omission. Rybicki, 354 F.3d at 141-42. Other Circuits appear to have adopted a similar materiality test. See, e.g., United States v. Cochran, 109 F.3d 660, 667 (10th Cir. 1997); United States v. Gray, 96 F.3d 769, 775 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997). Still other Circuits have required proof that the employee reasonably foresee that his employer will suffer some economic harm as a result of his breach. See, e.g., United States v. Vinyard, 266 F.3d 320, 327 (4th Cir. 2001), cert. denied, 536 U.S. 922 (2002); United States v. Martin, 228 F.3d 1, 17 (1st Cir. 2000); United States v. Pennington, 168 F.3d 1060, 1065 (8th Cir. 1999); United States v. Sun-Diamond Growers of California, 138 F.3d 961, 973-74 (D.C. Cir. 1998); aff'd in part, 526 U.S. 398 (1999); United States v. Frost, 125 F.3d 346, 369 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998).

In the context of public officials – the context at issue in this case – the law is even less uniform. The Seventh Circuit requires some form of *quid pro quo*. United States v. Bloom, 149 F.3d 649, 655 (7th Cir. 1998) (Section 1346 is limited to

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[3] The district courts, too, have struggled with the statute; recently several courts have dismissed indictments on the ground that the statute was unconstitutional as applied. See, e.g., United States v. Giffen, 326 F.Supp.2d 497 (S.D.N.Y. 2004) (statute unconstitutional if applied to alleged scheme to deprive foreign citizen of honest services); United States v. Warner, 292 F.Supp.2d 1051 (N.D. Ill. 2003) (statute unconstitutional if applied to prohibit private businessmen defrauding of public).

claims that the defendant "misused his office for private gain"). The Third Circuit, however, has rejected Bloom, and has held that the statute is violated when a public official "conceals a financial interest in violation of state criminal law and takes discretionary action in his official capacity that the official knows will directly benefit the concealed interest . . . regardless whether the concealed financial interest improperly influenced the official's actions." United States v. Panarella, 277 F.3d 678, 680 (3d Cir.), cert. denied, 537 U.S. 819 (2002). The First Circuit has gone even further, suggesting that "honest services" fraud may be found whenever a public official intentionally breaches his or her fiduciary duty. United States v. Sawyer, 85 F.3d 713, 732 (1st Cir. 1996); see also United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997).

There is also disagreement over whether a violation of state law is a prerequisite to commission of the federal offense. The Seventh Circuit has said that it is not, Bloom, 149 F.3d at 654, Martin, 195 F.3d at 967, and the First Circuit has agreed. Sawyer, 85 F.3d at 726. But the Third Circuit has required the government to show that the "conduct that amounts to honest services fraud is conduct that the state itself has chosen to criminalize." Panarella, 277 F.3d at 694. See also United States v. Murphy, 323 F.3d 102 (3d Cir. 2003). Still other Courts have insisted that the government prove a duty under state law, but not necessarily that breach of that duty constitutes a state crime. See, e.g., Brumley, 116 F.3d at 733-34 (state law must provide the basis for the honest services owed by the defendant).

In United States v. Margiotta, 688 F.2d 108, 142-43 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983) (Winter, J., concurring and dissenting in part), Judge Winter criticized the then newly-emerging theory of "honest services" mail fraud:

> One searches in vain for even the vaguest contours of the legal obligations created beyond the obligation to conduct governmental affairs

> "honestly" or "impartially," to ensure one's "honest and faithful participation" in government and to obey "accepted standards of moral uprightness, fundamental honesty, fair play and right dealing."

Margiotta, 688 F.2d at 142-43, quoting United States v. Mandel, 591 F.2d 1347, 1361 (4th Cir. 1979).

This case illustrates the wisdom of Judge Winter's concerns, capturing just how the statute's ambiguity permits poor local government to be transformed into a federal crime. Here, despite years of investigation, extensive scrutiny of Loren-Maltese's finances, and scores of witnesses, the government did not prove that Loren-Maltese received any "personal gain" from her conduct. To comply with Seventh Circuit law (although it is not a requirement in every Circuit), the government concocted a *quid pro quo* out of the 100% insurance coverage policy – a longstanding Town practice that was permitted under the insurance contract, preceded Loren-Maltese's tenure as President and SRC's tenure as insurance administrator, and applied to all key employees, even those who had nothing to do with the Town's insurance.[4]

In reality, the government's case against Loren-Maltese rested on the premise that she violated a public trust because she failed to terminate SRC after she was warned of skyrocketing insurance costs. The federal government, however, is not "Big Brother," empowered to prosecute local officials who fail to

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[4] The Seventh Circuit found a "modest" *quid pro quo* because some members of Loren-Maltese's family also received 100% medical benefits. (App. 8) These family members, however, were Town employees and the Town Plan contemplated that the family of key Town officials would also be able to receive the "perk" of 100% reimbursement.

meet some undefined standard of "good government." In a federal criminal case, the question should not be whether a state or local official has failed her constituency, but rather whether she has committed a federal crime.

The mail and wire fraud statutes have been characterized as the "Stradivarius . . .[the] Colt 45 . . . [the] Louisville Slugger . . . [the] true love of federal prosecutors." Hon. Jed. S. Rackoff, The Federal Mail Fraud Statute (Part I), 18 Duq. L. Rev. 771, 775 (1980). It is because the statutes are so broad in scope that they are so inviting to prosecutors. The "honest services" statute has added yet another layer of ambiguity, resulting in inconsistent and irreconcilable decisions, all of which strive, unsuccessfully, to define an essentially undefinable concept of fraud.

This Court's intervention is critical. When, in 1987, the Court held that the mail and wire fraud statutes did not contemplate prosecution on an "honest services" theory of fraud the Court was concerned about the wide disagreement among the courts over what conduct was criminally proscribed. The very same problems have resurfaced, only to a greater degree because of the confusion over whether Section 1346 by itself revived pre-McNally law. Congress, in reviving the "honest services" theory, did not "speak clearly" and, as several members of the federal judiciary have concluded, the "honest services" statute, as written, fails to adequately give notice of what conduct is proscribed, the statute should be struck down.[5]

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[5] "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

At the very least, this Court should resolve the many conflicts over the statute's scope and meaning. While uniform interpretation of a criminal statute is always important, it is particularly critical when dealing with a fraud as amorphous as the deprivation of "honest services." In the public arena, "honest services" fraud implicates the delicate relationship between the federal government and the States, arming federal prosecutors with the power to prosecute State and local officials for perceived misconduct without any clear guidelines as to what conduct is criminally prohibited. The end result has been a hodgepodge of decisions that attempt to narrow the scope of the statute, but fail to provide any real limits on this federal intrusion into state and local government.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER, UNDER A THEORY OF "JOINT AND SEVERAL LIABILITY," A DEFENDANT CAN BE SUBJECT TO RICO FORFEITURE WHEN THE DEFENDANT HAS NOT PERSONALLY OBTAINED PROCEEDS FROM THE RACKETEERING ENTERPRISE

The RICO forfeiture statute, §1963(a)(3), provides that a defendant "shall forfeit ... any property constituting, or derived from, any proceeds *which the person obtained*, directly or indirectly, from the racketeering activity." (Emphasis added) On its face, forfeiture is limited to the proceeds that the individual defendant "obtained" from the illegal activity.

Loren-Maltese did not obtain any proceeds, directly or indirectly, from SRC's illegal activity. All the proceeds went into the hands of the SRC defendants. Over objection, the jury was instructed that it did not matter whether Loren-Maltese personally benefitted from the illegal activity. Rather, the jury was told that "in regard to the cash the government seeks to forfeit, each defendant convicted of the racketeering conspiracy is liable for the full amount of the money he or she reasonably

could have foreseen would be acquired as a result of the conspiracy." The government argued that the jury should order forfeiture against Loren-Maltese in the amount of $4 million, which the government contended constituted the net proceeds from the RICO fraud. The jury ordered a forfeiture as to Loren-Maltese in the amount of $3,250,000, an amount that bore no relationship to any evidence in the case, but instead appears to reflect the jury's notion of what would constitute an appropriate monetary sanction.

This Court has not addressed whether a defendant personally can be liable for RICO forfeiture if the defendant has not herself received any proceeds from the racketeering activity. The lower courts, however, disregarding the language of the RICO statute, have concluded that forfeiture can be imposed against a defendant who has not obtained any illegal proceeds on a theory of "joint and several liability" – that is, that each conspirator is jointly and severally liable for the total forfeiture amount regardless of whether he or she personally obtained any proceeds from the illegal activity. See, e.g., United States v. Masters, 924 F.2d 1362 (7th Cir.), cert. denied, 500 U.S. 919 (1991); United States v. Corrado, 227 F.3d 543, 553 (6th Cir. 2000); United States v. Simmons, 154 F.3d 765, 769-70 (8th Cir. 1998). This theory equates forfeiture with a civil money judgment imposed against joint tortfeasors. Reliance on this theory has resulted in decisions affirming the forfeiture of funds relating only to conduct of which the defendant has been acquitted. See, e.g., United States v. Edwards, 303 F.3d 606, 642 (5th Cir. 2002), cert. denied, 537 U.S. 1192 (2003); United States v. Fruchter, 411 F.3d 377, 383 (2d Cir. 2005).

In this case, the Seventh Circuit took a slightly different approach. The Seventh Circuit had earlier held that forfeiture is "gain based" (unlike restitution, which is "loss based"). United States v. Genova, 333 F.3d 750, 761 (7th Cir. 2003). Yet here, it upheld the forfeiture of more than $3,250,000 against Loren-Maltese individually, even though the Court recognized that she

did not personally "gain" from the RICO activity. The Court opined that the "proceeds of a conspiracy are a debt owed by each of the conspirators" (App. 9), but then made no attempt to reconcile this view of forfeiture with its holding in Genova or explain why a defendant should be punished when he or she has not "gained" from the criminal activity.

Imposing forfeiture without regard to personal liability raises serious due process concerns. It authorizes punishing one individual for the conduct of another. Criminal forfeiture under the RICO statute is neither a civil damages award nor a debt that is owed by a conspiracy. It is "clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional fine." Alexander v. United States, 509 U.S. 544, 558 (1993). As punishment, the courts' power to punish must be clearly set forth in the statute authorizing the punishment.

The RICO statute appears to be clear: the defendant shall forfeit the proceeds he "obtained, directly or indirectly, from racketeering activity." Nothing in the statute's language authorizes imposing punishment on one defendant because another defendant has reaped a financial benefit from the fraud.

Each form of monetary punishment is unique and serves a different purpose. A fine reflects the individual's degree of culpability. Restitution recompenses the victims for a loss; in that case, joint and several liability makes sense. Forfeiture, in contrast, requires the return of proceeds gained from the illegal enterprise. If the defendant has not gained from the criminal activity, there is nothing for her to return.

This case illustrates the inequity of punishing a defendant by imposing forfeiture when that defendant has not obtained proceeds from the illegal activity. Here, there was no evidence that Loren-Maltese "acquired or maintained" a sum of $3,250,000 from the racketeering activity. There was no evidence that she acquired anything of value. Yet, although

Loren-Maltese, unlike other defendants, did not "gain" from the alleged fraud, the government has sought to enforce the entire cash forfeiture verdict against Loren-Maltese, through successive, subsequent forfeiture orders, deeming all Loren-Maltese's property to be "substitute assets," including her family home where her young daughter resides with her elderly mother.

The lower courts have never carefully examined either the language or legislative history of RICO forfeiture. They have instead blindly adhered to the premise that forfeiture constitutes a joint and several liability – a concept that disregards the very nature of forfeiture as punishment. This Court should grant certiorari to resolve this very important, recurring question.

III. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE HEARSAY EXCEPTION FOR PUBLIC RECORDS PERMITS A COURT TO EXCLUDE GOVERNMENTAL MINUTES ON THE BASIS OF THE COURT'S DETERMINATION THAT THE MINUTES ARE "UNTRUSTWORTHY"

State law, local ordinance and the Town of Cicero charter mandate that the Town Clerk keep minutes of Town Board meetings. 65 Ill. Comp. Stat. 5/3.1-35-90; Cicero Code §2-172; Cicero Charter §4. At Loren-Maltese's trial, the government sought to introduce those minutes as business or public records, pursuant to F.R. Evid., 803(6) and 803(8). A co-defendant, Joseph DeChicio (who was acquitted) opposed the admission of particular minutes that were prejudicial to him. Loren-Maltese sought to have the minutes admitted, either by the government or during the defense case.

The dispute over the minutes centered on Board meetings that took place between October, 1996, when publicity about SRC surfaced, and February, 1997, when SRC was terminated. The minutes, which included amended minutes, reflect that

Loren-Maltese was actively seeking an investigation of SRC, and ordered the cessation of payments to SRC, but that DeChicio continued to make those payments, falsely denying that he had done so.

The government, as the party that initially proffered the minutes, conceded that it had "no information or evidence that the minutes as amended are inaccurate," or that "statements contained in the minutes were not accurately reported." Nevertheless, the district court excluded the minutes because, in the court's view, Loren-Maltese's statements as recorded in the minutes were self-serving; therefore, the minutes lacked "trustworthiness."[6]

On appeal, the Seventh Circuit held that, as a matter of law, a court can exclude duly recorded minutes of a governmental body, even if they are otherwise admissible as a "public record" pursuant to Rule 803(8) of the Federal Rules of Evidence, if the court determines that the "circumstances indicate lack of trustworthiness." (App. 11) The Court did not spell out what circumstances would establish lack of trustworthiness other than to note that, in this case, the minutes were purportedly "controlled" by Loren-Maltese.

Minutes of governmental meetings unquestionably fall under the "public records" exception to the hearsay rule, which provides, in pertinent part, for the admissibility of:

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[6] The court, in fact, was more troubled by the impact the minutes would have on DeChicio's defense, characterizing the minutes as "damning testimony against DeChicio." Were the minutes admitted, the court noted, the government could argue that DeChicio was so "wedded" to the SRC conspirators that he disobeyed instructions to stop paying them. This, the court commented, "would be by far the most incriminating testimony against DeChicio." (See Point IV, infra)

> Records ... in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report ... or (C) in civil actions ...and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, *unless the sources of information or other circumstances indicate lack of trustworthiness.*

F.R. Evid. 803(8) (emphasis added). Here, the Board's minutes, required by State and local law, contain a record of the Board's activities, see Rule 803(8)(A), as well as "matters observed pursuant to a duty imposed by law." See Rule 803(8)(B). Thus, they are plainly admissible.

Nevertheless, though admissible, the minutes were excluded based on a fundamental misreading of Rule 803(8). Both the trial court and the Seventh Circuit concluded that even a public record that does not contain "factual findings resulting from an investigation" – that is, a record that does not fall under the Rule 803(8)(C) exception – may be excluded based on a determination by the trial court that the record is untrustworthy. Consequently, certiorari is sought to answer two important questions that have never been definitively resolved: first, does the last clause of Rule 803(8), the "trustworthiness" proviso, apply to Rule 803(8) (A) and (B) – the exceptions at issue or here – or does it modify only Rule 803(8)(C); and second, if the proviso applies across-the-board, what factors must a court consider before excluding a public record as untrustworthy.

The proper interpretation of Rule 803(8) is a question deserving of this Court's review. Rule 803(8) is hardly a model of clarity; certainly, it is not self-evident whether the trustworthiness proviso modifies each of the Rule 803(8)

exceptions or only the exception for investigatory reports. The Advisory Committee Notes suggest that the exception applies only to the "controversial area" of "the so-called evaluative report." Advisory Committee Notes, 1972, Note to Rule 803(8). The Committee noted that public records have been long admissible under a common law exception to the hearsay rule because of the "assumption that a public official will perform his duty properly." Id. But, when addressing potentially biased "evaluative reports," while admissibility is assumed, there is "ample provision for escape if sufficient negative factors are present." Id.

Generally, the courts invoke the trustworthiness provision in connection with public investigatory reports. See, e.g., Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988) (investigatory reports including conclusions are admissible because the "trustworthiness" provision protects against the admission of biased reports); Perrin v. Anderson, 784 F.2d 1040 (10th Cir. 1986) (addressing factors to determine whether investigatory report is trustworthy); United States v. Jackson-Randolph, 282 F.3d 369, 380-81 (6th Cir. 2002) (affirming exclusion of investigatory report based on testimony of witness with motive to lie). Investigatory reports, by their very nature, raise questions about reliability because they may be created with an eye to later litigation. Board minutes, in contrast, reflect what took place at a public meeting. People who participate in the meeting may or may not be speaking the truth, but if the minutes accurately record what they said, the minutes are reliable. Any question about the credibility of the statements recorded in the minutes is for the *jury* and not for the court.

If "trustworthiness" is a prerequisite to admissibility of all public records under Rule 803(8)(A) and (B), and not only investigatory or evaluative reports under Rule 803(8)(C), it should be clearly stated. Should the Court interpret the Rule in that fashion – which we advocate against – this Court should then determine what factors a trial court must consider in

deciding whether routinely prepared public records, such as Board minutes, are unreliable.

The need for clear guidelines is apparent. Here, for example, there was no evidence that the public official who prepared the minutes did not perform his duties properly. To the contrary, contemporaneous notes generally confirmed the accuracy of the minutes, and, where there was a dispute over the amended minutes, several Board members, at an Executive Committee meeting, disputed the assertion that the amended minutes were inaccurate. Throughout, the concern was over the content of the minutes. This trial judge mistrusted the minutes because he believed, without any evidentiary support, that Loren-Maltese had the power to dictate what they contained.

Questions of reliability should not be left to the whim of the particular Judge, who, as in this case, may have doubts about the credibility of the content of the public record. If otherwise admissible governmental minutes of Board of Trustee meetings are to be excluded from evidence, it must be shown that the minutes were not prepared in accordance with the public official's duty. Certiorari should be granted to clarify the meaning of Rule 803(8).

IV. CERTIORARI SHOULD BE GRANTED TO REVISIT THE RULE OF ZAFIRO V. UNITED STATES AND TO RESOLVE WHETHER A COURT MUST GRANT A SEVERANCE WHEN ONE DEFENDANT'S CONSTITUTIONAL RIGHTS CONFLICT WITH A CO-DEFENDANT'S CONSTITUTIONAL RIGHTS

The lower court's decision to exclude the minutes that were exculpatory of Loren-Maltese was only secondarily premised on its view that the minutes were self-serving and therefore "untrustworthy." In fact, the government proffered the

minutes, and issue as to their admissibility only arose when co-defendant DeChicio sought to exclude the minutes. Throughout, the court's primary concern was in protecting DeChicio's constitutional rights.[7]

During the extensive argument relating to the minutes, the court characterized the evidence as the most "damning" and most "incriminating" testimony against DeChicio. The Court was properly concerned that, if the minutes were admitted, DeChicio's Sixth Amendment right to confrontation would be infringed. It was this constitutional concern that led the court to grant DeChicio's motion in limine.

The minutes, however, were crucial to Betty Loren-Maltese's defense because they provided independent confirmation that, when she learned of the SRC fraud, she took immediate steps to investigate and put an end to it. Thus, Loren-Maltese independently sought admission of the minutes, arguing that, she, too, had a constitutional right – a Sixth Amendment right to present a defense, which includes the right to introduce admissible and relevant evidence. Taylor v. Illinois, 484 U.S. 400, 409 (1988); Rock v. Arkansas, 483 U.S. 44 (1987); Washington v. Texas, 388 U.S.14 (1967).

The right to confrontation and the right to present a defense stand on equal footing. One constitutional right cannot trump another. Unfortunately, as this case illustrates, there are circumstances where the two rights collide. When that happens, there is a solution, but it is one that the courts go out of their way to avoid: A severance pursuant to Rule 14 of the Federal Rules

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[7] Although this issue was fully briefed, the Seventh Circuit did not address it.

of Criminal Procedure.[8]

This Court has not often addressed when severances in criminal trials must be granted. In Zafiro v. United States, 506 U.S. 534, 539 (1993), the Court stated the general rule: a severance is necessary, "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Zafiro plainly contemplated that a severance may be required if a conflict results in the admission or exclusion of evidence that prejudices a particular defendant and the challenged evidentiary ruling would not have been made were that defendant tried alone. As the Court explained, a "defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial." Id.

In Zafiro, however, the Court also held that the existence of "mutually antagonistic defenses" does not ordinarily justify a severance. Id. at 538. The lower courts have read this ruling very broadly, reasoning that, in light of Zafiro, a severance can be denied whenever there is a conflict between defendants, even when the real issue, as in the case, is not the existence of antagonistic defenses, but rather the fact that protecting one defendant's constitutional rights infringes on another's defendant's competing constitutional rights.

This fundamental misreading of Zafiro should be remedied. As in the area of co-defendant confessions, see, e.g., Bruton v. United States, 391 U.S. 123 (1968), if evidence is admissible as to one defendant, but not as to another, the solution is not to penalize the defendant whose constitutional rights are in jeopardy, but to sever the trials of the defendants.

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[8] Loren-Maltese unsuccessfully sought a severance, both before and during the trial.

The Court should take this opportunity to clarify when, under Rule 14, a severance is required, and to address what a court must do if the rights of one defendant irremediably conflict with the rights of another defendant.

CONCLUSION

For the reasons set forth, the writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 23, 2005

APPENDIX

United States Court of Appeals,
Seventh Circuit.
UNITED STATES of America,
Plaintiff-Appellee/Cross-Appellant,
v.
Michael SPANO, Sr., et al.,
Defendants-Appellants/Cross-Appellees,
and
Bonnie LaGiglio, Defendant-Appellant.
Nos. 03-1111, 03-1114, 03-1140, 03-1172, 03-1176, 03-1180,
03-1408, 03-1590,
04-1014, 04-1035, 04-1057, 04-1072, 04-1073, 04-1095,
04-1125.

Argued April 5, 2005.
Decided Sept. 1, 2005.

Background: Defendants were convicted in the United States District Court for the Northern District of Illinois, John F. Grady, J., for mail fraud, Racketeer Influenced and Corrupt Organizations Act (RICO) violations, money laundering, and conspiracy to impede the assessment and collection of taxes, arising out of a scheme to defraud a town. Defendants appealed, and government cross-appealed, challenging the sentences.

Holdings: The Court of Appeals, Posner, Circuit Judge, held that:

(1) defendant, as town mayor, could be convicted of mail fraud;

(2) exception to hearsay rule for business records did not apply to permit admission of minutes of town board meetings held several months after the government's investigation of a fraud scheme;

(3) District Court was not required to conduct a hearing to determine whether one juror's mention during deliberations of one defendant's possible connections to organized crime had prejudiced the jury;

(4) admission of evidence that cooperating coconspirator was

an alcoholic and a marijuana user during the conspiracy was not warranted;

(5) sentences could not be increased for corruption of financial institution;

(6) costs incurred by defendants in processing and paying legitimate insurance claims could be deducted from the total amount paid by town, in determining loss for sentencing purposes;

(7) sentencing court was not permitted to round the loss estimation down from $10.6 million to $10 million; and

(8) remand for resentencing under advisory Sentencing Guidelines was warranted.

Affirmed in part, vacated in part, and remanded.

West Headnotes

[1] Fraud 68
184k68 Most Cited Cases
A participant in a scheme to defraud is guilty of fraud even if he is an altruist and all the benefits of the fraud accrue to other participants, just as a conspirator does not have to benefit personally to be guilty of conspiracy.

[2] Conspiracy 24.10
91k24.10 Most Cited Cases

[2] Fraud 68
184k68 Most Cited Cases
Neither the scheme to defraud, nor the conspiracy, has to succeed in inflicting harm for the participants to be guilty of either fraud or conspiracy.

[3] Postal Service 35(9)
306k35(9) Most Cited Cases
Defendant, as town mayor, could be convicted of mail fraud, involving the deprivation of the government of her honest

services, even though the only remuneration she received for her role in the fraud scheme was reimbursement of 100 percent of her and her family's medical expenses, and it was town's practice to reimburse 100 percent of mayor's medical expenses, where the town's health insurer only provided 80 percent coverage for defendant's and her family's medical expenses. 18 U.S.C.A. §§ 1341, 1343, 1346.

[4] Forfeitures 3
180k3 Most Cited Cases
The proceeds of a conspiracy are a debt owed by each of the conspirators, for purpose of determining forfeiture amount.

[5] Criminal Law 429(1)
110k429(1) Most Cited Cases
Exception to hearsay rule for public records did not apply to permit admission of minutes of town board meetings held several months after the government's investigation of a fraud scheme involving town officials became public knowledge, in prosecution for mail fraud, Racketeer Influenced and Corrupt Organizations Act (RICO) violations, and money laundering, where minutes contained false statement by alleged coconspirator, and minutes were later amended to reflect statement by another coconspirator. Fed.Rules Evid.Rule 803(8), 28 U.S.C.A.

[6] Criminal Law 436(2)
110k436(2) Most Cited Cases
For purpose of the hearsay exception for business records, when the record keeper, rather than being a clerical or professional employee, is a principal with a strong motive to falsify the records, the district judge may deem them so unreliable as to be unworthy of consideration by the jury. Fed.Rules Evid.Rule 803(6), 28 U.S.C.A.

[7] Criminal Law 868
110k868 Most Cited Cases
Ordinarily, when extraneous materials are brought into the jury room, a hearing is required to determine whether the jurors' deliberations were fatally compromised by their exposure to the materials.

[8] Criminal Law 868
110k868 Most Cited Cases
The District Court was not required to conduct a hearing to determine whether one juror's mention during deliberations of one defendant's possible connections to organized crime had prejudiced the jury, in prosecution for mail fraud, Racketeer Influenced and Corrupt Organizations Act (RICO) violations, money laundering, and conspiracy to impede the assessment and collection of taxes, arising out of a scheme to defraud a town; jury had previously advised judge about extraneous material brought into the jury room, the judge had determined that the prior extraneous material had not influenced the jury, and based on that experience, judge could reasonably determine that jury was conscientious and would not be influenced by the comment.

[9] Witnesses 344(2)
410k344(2) Most Cited Cases
It is improper to impeach a witness by presenting evidence that he has engaged in criminal or otherwise illegal or socially reprobated behavior, unless the evidence undermines the credibility of his testimony beyond whatever undermining would be accomplished just by besmirching the witness's character.

[10] Witnesses 344(2)
410k344(2) Most Cited Cases
Admission of evidence that cooperating coconspirator was an alcoholic and a marijuana user during the conspiracy was not warranted, in prosecution for mail fraud, Racketeer Influenced and Corrupt Organizations Act (RICO) violations, money laundering, and conspiracy to impede the assessment and

collection of taxes, arising out of a scheme to defraud a town, absent evidence that cooperating coconspirator was high or drunk while testifying, or evidence that the alcohol or marijuana impaired his memory or prevented him from understanding the events about which he testified.

[11] Sentencing and Punishment ⚿737
350Hk737 Most Cited Cases
Sentences of defendants convicted of mail fraud, and Racketeer Influenced and Corrupt Organizations Act (RICO) violations could not be increased for corruption of financial institution; although defendants used a bogus insurance company to process insurance claims for town employees, and used that company to siphon money from the town, the company did not qualify as a financial institution, since it was not really an insurance company and it did not engage in financial intermediation. U.S.S.G. § 2F1.1(b)(6), 18 U.S.C.A.(2000).

[12] Sentencing and Punishment ⚿736
350Hk736 Most Cited Cases
In determining the loss attributable to defendants convicted of mail fraud for sentencing purposes, arising out of an insurance scheme, involving defendants' use of a bogus insurer to defraud a town, the costs incurred by defendants in processing and paying legitimate insurance claims could be deducted from the total amount paid by town. U.S.S.G. § 2F1.1, 18 U.S.C.A.(2000).

[13] Sentencing and Punishment ⚿736
350Hk736 Most Cited Cases
For sentencing purposes, a defendant convicted of fraud is entitled to deduct from the loss calculation any value the defendant gave the victim at the time of the fraud.

[14] Sentencing and Punishment ⚿736
350Hk736 Most Cited Cases
The costs incurred by the criminal to commit the crime will not be deducted from the total loss amount, for purpose of

determining loss for sentencing purposes. U.S.S.G. § 2F1.1, 18 U.S.C.A.(2000).

[15] Sentencing and Punishment ⚿736
350Hk736 Most Cited Cases
Sentencing court was not permitted to round the loss estimation down from $10.6 million to $10 million, in determining the loss attributable to defendants
convicted of mail fraud, absent evidence that estimate was product of bias. U.S.S.G. § 2F1.1, 18 U.S.C.A.(2000).

[16] Criminal Law ⚿1181.5(8)
110k1181.5(8) Most Cited Cases
Ordinarily an error in a sentence requires resentencing.

[17] Criminal Law ⚿1181.5(8)
110k1181.5(8) Most Cited Cases
Remand for resentencing under advisory Sentencing Guidelines was warranted for defendants convicted of mail fraud, Racketeer Influenced and Corrupt Organizations Act (RICO) violations, and money laundering, where Court of Appeals determined that the sentencing court incorrectly rounded the sentencing loss estimation down from $10.6 million to $10 million, and government indicated that it wanted to pursue its cross-appeal on the sentence and take its chances on resentencing, even after the decision in *United States v. Booker*, holding that Sentencing Guidelines were advisory, rather than mandatory. U.S.S.G. § 2F1.1, 18 U.S.C.A.(2000).

West Codenotes
Limitation Recognized

U.S.S.G. § 2F1.1, 18 U.S.C.A.

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Before POSNER, EASTERBROOK, and EVANS, Circuit Judges.

POSNER, Circuit Judge.

The seven defendants were convicted after a three-month jury trial of a variety of federal offenses, including mail fraud, RICO, and money laundering, arising out a scheme to defraud the Town of Cicero, Illinois. (Bonnie LaGiglio, however, was convicted only of a tax offense.) They received prison sentences ranging from 41 to 151 months, as well as being ordered to forfeit a total of $4 million in proceeds of their fraud (plus two real estate parcels)-- a fraud that cost the Town more than $10 million. Their appeals, together with the government's cross-appeal, which seeks higher sentences for all but Bonnie LaGiglio, present more than 20 issues, but many of them are too insubstantial to require discussion. Because the sentences were based in part on factfindings made by the judge, the government concedes that the defendants are entitled to the limited remand authorized by *United States v. Paladino*, 401 F.3d 471, 483-84 (7th Cir.2005), though to nothing more. The force of the concession is obscure, in light of the government's cross-appeal; but that is for later.

Cicero is self-insured for its employees' health benefits, and until 1992 used the Travelers insurance company to process the

bills submitted to the Town by providers of health care to its employees. That year the Town switched to Specialty Risk Consultants. SRC, created by two of the defendants, was the instrument of the fraud; other defendants were Town officials, including the President of the Board of Trustees (i.e., mayor), Loren-Maltese. Millions of dollars that the Town paid to SRC were siphoned to a partnership, Plaza Partners, which was a tool of the conspirators and provided them with money and other things of value, including a golf course and a horse farm. The fraud, which continued until it was unmasked in 1996, has done nothing for the reputation of Cicero, a town notorious as the headquarters of Al Capone, *Hamania v. Loren-Maltese*, 212 F.3d 353, 354 (7th Cir.2000); Laurence Bergreen, *Capone: The Man and the Era* 97-99 (1996); Matthew Engel, "Spirit of Capone Lives on in Mobtown, Illinois: Mayor's $12m Scam Follows in Footsteps of Scarface, Baldy and the Big Tuna," *Guardian (London)*, Aug. 31, 2002, p. 3, and with an 80-year history of links to organized crime. "Is Cicero Ready for Reform?," *Chicago Tribune*, Apr. 3, 2003, p. 22.

Loren-Maltese, though a key player in the fraud by virtue of her position as the Town's mayor, received only modest remuneration--primarily reimbursement of 100 percent of her medical bills; Cicero's benefits plan entitled her to only 80 percent. She points out that there was a practice predating the fraud of reimbursing additional amounts upon written authorization by a Town official; her predecessor had been reimbursed for 100 percent of his medical bills on this basis, and presumably she would have been as well even if SRC had not replaced Travelers as the administrator of the Town's plan.

[1][2] She argues that if the extra coverage she received was not in exchange for her complicity in the fraud, she is not guilty of the form of fraud, with which she was charged, that consists of an official's depriving the government of his or her honest services. 18 U.S.C. §§ 1341, 1343, 1346; *United States v. Martin*, 195 F.3d 961, 965-66 (7th Cir.1999). The argument

*603 is a non sequitur. A participant in a scheme to defraud is guilty even if he is an altruist and all the benefits of the fraud accrue to other participants, *Lombardo v. United States*, 865 F.2d 155, 159-60 (7th Cir.1989); cf. *United States v. Moede*, 48 F.3d 238, 242 (7th Cir.1995); *United States v. Blasini-Lluberas*, 169 F.3d 57, 65 (1st Cir.1999); *United States v. Oplinger*, 150 F.3d 1061, 1065 (9th Cir.1998), just as a conspirator doesn't have to benefit personally to be guilty of conspiracy--a point so obvious that we can't find a case that states it, although it is implicit in statements of the elements of conspiracy, of which personal benefit is not one. E.g., *United States v. Duran*, 407 F.3d 828, 835-36 (7th Cir.2005); *United States v. Miller*, 405 F.3d 551, 555-56 (7th Cir.2005). For that matter, neither the scheme to defraud, *United States v. Tadros*, 310 F.3d 999, 1006 (7th Cir.2002); *United States v. Pimental*, 380 F.3d 575, 585 (1st Cir.2004), nor the conspiracy, e.g., *United States v. Bond*, 231 F.3d 1075, 1079 (7th Cir.2000); *United States v. Martin*, 228 F.3d 1, 10-11 (1st Cir.2000), has to succeed in inflicting harm for the participants to be guilty.

[3] In the case of a successful scheme, the public is deprived of its servants' honest services no matter who receives the proceeds. In any event there was evidence that as a reward for her participation Loren-Maltese received accelerated reimbursement and, more important, reimbursement of 100 percent of the medical expenses incurred by members of her family; there was no evidence that her predecessor had received such largesse.

[4] She makes the related complaint that she should not have been found liable to forfeit more than $3 million of illegal proceeds, since so little of that amount found its way into her pocket. But the proceeds of a conspiracy are a debt owed by each of the conspirators. *United States v. Genova*, 333 F.3d 750, 761 (7th Cir.2003); *United States v. Masters*, 924 F.2d 1362, 1369-70 (7th Cir.1991); *United States v. Edwards*, 303 F.3d 606, 643-44 (5th Cir.2002). It would be absurd to treat them more leniently than the law treats a lawful partnership, all of

whose members are severally as well as jointly liable for the partnership's debts.

A number of cases, it is true, though none in this circuit, require the defendant to forfeit only so much of the proceeds (not received by him) of the fraud as were foreseeable to him, e.g., *United States v. Fruchter*, 411 F.3d 377, 384 (2d Cir.2005); *United States v. Bollin*, 264 F.3d 391, 419 (4th Cir.2001); *United States v. Corrado*, 227 F.3d 543, 558 (6th Cir.2000); *United States v. Hurley*, 63 F.3d 1, 22 (1st Cir.1995), by analogy to the liability of a conspirator for only those misdeeds of his coconspirators that were foreseeable by him. *Id.* Other cases do not discuss this requirement. We have found no case that rejects it, but we note that there is a difference between criminal liability for the acts of others and liability on a debt created by partners in a criminal scheme. No matter; Loren-Maltese authorized payments by the Town to SRC and knew that SRC was a fraud and so should have foreseen the possibility of a massive loss. She does not argue the contrary or even that foreseeability is required for a forfeiture.

[5] The only other significant issue she raises concerns the judge's exclusion, as being unreliable, of minutes of meetings of the Town's Board of Trustees held several months after the government's investigation of the fraud became public knowledge. Loren-Maltese presided at meetings of the Board and other conspirators were among its members. The minutes of the meeting of January 6, 1997, contain a statement by one of the conspirator members (though he *604 was acquitted), DeChicio, that no payments had been made by the Town to SRC since October 1996. That was false. A week later the minutes were amended to state that at the January 6 meeting Loren-Maltese had twice asked DeChicio whether any payments had been made to SRC "since the October 1996 Board Meeting at which time the board directed no further monies be paid to [SRC] unless by Town Board approval." Neither the minutes of the October meeting nor those of the January 6 meeting had mentioned any

such direction. The inference of doctoring, even in the case of the unamended version of the January 6 minutes, is strong, and the public-records exception to the hearsay rule is inapplicable when the "circumstances indicate lack of trustworthiness." Fed.R.Evid. 803(8); *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167-68, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988).

[6] The provision is tailor-made for a case in which the records are controlled by the defendants themselves rather than by clerks assumed to be disinterested. *Reynolds v. Green*, 184 F.3d 589, 596 (6th Cir.1999); *Peppers v. Ohio Dept. of Rehabilitation & Correction*, 50 Ohio App.3d 87, 553 N.E.2d 1093, 1094-95 (1988); compare *Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir.1995). As we explained recently in *Kikalos v. United States*, 408 F.3d 900, 904 (7th Cir.2005), with reference to the parallel hearsay exception for business records, Fed.R.Evid. 803(6), "when the record keeper, rather than being a clerical or professional employee, is a principal with a strong motive to falsify the records, the district judge may deem them so unreliable as to be unworthy of consideration by the jury; in the language of the rule, they are to be excluded if 'the method or circumstances of preparation indicate lack of trustworthiness.' See *Wheeler v. Sims*, 951 F.2d 796, 802 (7th Cir.1992); *Bracey v. Herringa*, 466 F.2d 702, 704-05 (7th Cir.1972); *Romano v. Howarth*, 998 F.2d 101, 108 (2d Cir.1993)."

Bonnie LaGiglio was the wife of one of the principal conspirators. Her name appears in the signature space of countless checks issued by Plaza Partners. In addition, funds that passed from the Town to SRC to Plaza Partners were disbursed by the partnership to her and reported on her income tax returns. If her signature on the checks was genuine, the jury was entitled to infer that she knew that the partnership was an instrument of fraud and thus knowingly helped it to succeed. Although the judge found "that there is simply insufficient evidence for this jury to conclude that she knew about the fraud against the town," that finding is consistent with her conviction for conspiracy to

impede the IRS in the assessment and collection of taxes. 18 U.S.C. § 371. The evidence revealed that she knew that Plaza Partners was a device for enabling her husband to avoid reporting income to the IRS, and thus knowingly assisted him in that project.

She claims that her husband forged all her signatures. The jury was shown handwriting exemplars--that is, signatures of Bonnie LaGiglio known to be genuine--and asked to compare them with the signatures in her name on the checks and on other documents of Plaza Partners. No handwriting expert testified about the genuineness of the contested signatures. The checks and other documents were all copies, and in closing argument the prosecutor began to argue that handwriting experts are unable to authenticate signatures on copies. The defense rightly objected on the ground that no expert testimony or other basis had been provided for that implausible argument, and the judge ordered it stricken. It is doubtful that the argument helped the prosecutor; told that *605 even an expert can't verify the genuineness of signatures on copies, a juror asked to do just that might doubt his ability to do so, and vote to acquit. In any event, no rule of evidence makes a jury incompetent to determine the genuineness of a signature by comparing it to a signature known to be genuine. Fed.R.Evid. 901(b)(3); *United States v. Papia*, 910 F.2d 1357, 1366-67 (7th Cir.1990); *United States v. Saadey*, 393 F.3d 669, 679- 80 (6th Cir.2005); *United States v. Wylie*, 919 F.2d 969, 978 (5th Cir.1990); *United States v. Woodson*, 526 F.2d 550, 551-52 (9th Cir.1975) (per curiam).

All the defendants complain about a pair of incidents involving the jury. Cicero has, as we noted, a long history of being a center of organized crime. During the trial one of the jurors brought into the jury room a book that discussed organized crime in Cicero in the 1920s to 1940s (a period that encompassed the Capone era--he was active in Chicago from 1920 to 1931, becoming boss of the Chicago mob in 1925). The other jurors reported this juror to the judge, who removed him from the jury

but concluded after talking to the other jurors that they had not been contaminated by their exposure to the book. The judge observed realistically that most Chicagoans have some awareness of the association between Capone and Cicero.

[7] The day after the jury was discharged, a Chicago newspaper reported that one of the jurors said that Spano, Sr.'s reputed mob connections had been mentioned during the jury deliberations. The judge did not think that the newspaper article required him to conduct a hearing at which the jurors would be asked what exactly they had heard about Spano, Sr.'s mob connections. Ordinarily when extraneous materials are brought into the jury room, a hearing is required (as in the case of the book about Cicero) to determine whether the jurors' deliberations were fatally compromised by their exposure to the materials. *Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 (1954); *United States v. Reynolds*, 64 F.3d 292, 295-96 (7th Cir.1995). But that is not a hard and fast rule. As we explained in *Wisehart v. Davis*, 408 F.3d 321, 326 (7th Cir.2005), "the extraneous communication to the juror must be of a character that creates a reasonable suspicion that further inquiry is necessary to determine whether the defendant was deprived of his right to an impartial jury. How much inquiry is necessary (perhaps very little, or even none) depends on how likely was the extraneous communication to contaminate the jury's deliberations. *Evans v. Young*, 854 F.2d 1081, 1083-84 (7th Cir.1988); *Dyer v. Calderon*, 151 F.3d 970, 974-75 (9th Cir.1998) (en banc); *United States v. Williams-Davis*, 90 F.3d 490, 499-501 (D.C.Cir.1996); see generally *Oswald v. Bertrand*, 374 F.3d 475, 477-78, 480 (7th Cir.2004)." See also *United States v. Stafford*, 136 F.3d 1109, 1112-13 (7th Cir.1998). Jurors after all know many things that are not presented to them in the course of the trial, and doubtless use much of that background knowledge during their deliberations. Lots of things mentioned in jury deliberations are outside the record. Were the report of a juror who claims to have heard such a thing mentioned enough to require a hearing, few trials would end without a post-trial

interrogation of the jurors; jury service would be even less popular than it is.

[8] This trial lasted three months and the deliberations alone lasted 11 days; it is unlikely in the extreme that extraneous speculations were never voiced in the jury room. The trial judge, having observed the jury carefully and having been impressed by the jurors' conscientiousness (remember how they reacted to the book), *606 did not abuse his discretion in concluding that the likelihood that a reference to Spano, Sr.'s possible connections to organized crime had polluted the jury's consideration of the case was too slight to warrant hauling the jurors before him for an examination. See, e.g., *United States v. Berry*, 92 F.3d 597, 600 (7th Cir.1996); *United States v. Lloyd*, 269 F.3d 228, 238-39 (3d Cir.2001); *United States v. Sanders*, 962 F.2d 660, 668-74 (7th Cir.1992); *United States v. Bruscino*, 687 F.2d 938, 940-41 (7th Cir.1982) (en banc).

[9][10] Taylor, a key conspirator who had turned state's evidence, was a principal witness for the government. After the trial the defendants discovered that he had been an alcohol abuser and marijuana user during the conspiracy. They moved for a new trial on the basis of this newly discovered evidence, which they would have liked to impeach him with. It is improper to impeach a witness by presenting evidence that he has engaged in criminal or otherwise illegal or socially reprobated behavior unless the evidence undermines the credibility of his testimony beyond whatever undermining would be accomplished just by besmirching the witness's character. *United States v. Mojica*, 185 F.3d 780, 788-89 (7th Cir.1999); *Henderson v. DeTella*, 97 F.3d 942, 949 (7th Cir.1996); *United States v. Robinson*, 956 F.2d 1388, 1397-98 (7th Cir.1992). Were there any indication that Taylor had been high when he was testifying, that would certainly have been appropriate to point out to the jury; and likewise if there were any reason to think that alcohol or marijuana had seriously impaired his memory or had prevented him from understanding the events about which he testified when

they took place. *Id.* at 1398; *Jarrett v. United States*, 822 F.2d 1438, 1445-46 (7th Cir.1987); see *United States v. Sasso*, 59 F.3d 341, 347-48 (2d Cir.1995); compare *United States v. Smith*, 156 F.3d 1046, 1054-55 (10th Cir.1998). There was no reason to think either of these things. Nothing in Taylor's demeanor or testimony suggested to the judge that he was impaired to any degree. And there could be no doubt of his having been able to observe accurately the acts of the defendants during the fraud, for he had been the general manager of SRC. Had he been drunk, high, or otherwise behaving erratically during the conspiracy, the defendants, with whom he had had continuous dealings over a three-year period, would have noticed, and would have prompted their lawyers to cross-examine him accordingly--which the lawyers did not do.

The defendants are, however, entitled to a *Paladino* remand--which brings us to the government's cross-appeal. The government asked us in its brief to affirm the defendants' convictions and sentences, but, "alternatively"-- meaning, presumably, that if we don't affirm the convictions and sentences--to order the defendants (all but Bonnie LaGiglio) to be resentenced in accordance with the grounds presented in the cross-appeal. *Paladino* prevents us from affirming the sentences until the trial judge has advised us whether, had he known the federal sentencing guidelines were merely advisory, he would have given the defendants lighter sentences. 401 F.3d at 483-84.

There are two ways to interpret the government's position. One is that unless we affirm the sentences here and now, we should (if the cross-appeal has merit) remand for resentencing. The other is that, should there be a *Paladino* remand (as there must be), we should wait and see whether the remand results in a different sentence for any of the defendants; if not and if in consequence we affirm the original sentences, then the government has obtained its preferred result, and its alternative *607 submission (that the defendants be resentenced) becomes moot. If the second interpretation is correct, we could suspend

consideration of the cross-appeal until we hear from the judge, and if he decided that he would not have sentenced differently we would then dismiss the cross-appeal. But if the cross-appeal has identified errors, it is better that we point them out now rather than have to order the defendants resentenced after the *Paladino* remand. So let us determine the merits of the cross-appeal and then return to the question of the precise sense in which the government is demanding sentencing relief "alternatively."

[11] The government contends that the sentences of some of the defendants should have been enhanced because they had corrupted a "financial institution," U.S.S.G. § 2F1.1(b)(6) (1997) (now § 2B1.1(b)(13)); *United States v. Lauer*, 148 F.3d 766, 768-70 (7th Cir.1998), namely SRC. The term "financial institution" is defined to include insurance companies and "similar" enterprises. U.S.S.G. § 2F1.1 Application Note 14 (1997) (now § 2B1.1 Application Note 1). SRC processed claims, which is a typical insurance-company function. But what makes an insurance company a financial institution is that it invests its premiums in order to create a fund out of which to pay claims; it is a financial intermediary. See Thomas A. Smith, "Institutions and Entrepreneurs in American Corporate Finance," 85 *Cal. L.Rev.* 1, 5 (1997). SRC was not an insurance company and did not engage in financial intermediation. Money flowed through it, from the Town treasury to claimants and of course to the defendants, so it was "intermediate" between Town and claimants in a literal sense. But that is no different from the situation of a grocery store, which takes in money from its customers and pays it out to its owners and suppliers. Compare *United States v. Ferrarini*, 219 F.3d 145, 160-62 (2d Cir.2000).

[12][13][14] The government next contends that in calculating the loss caused by the fraud the judge should have disregarded all costs incurred by SRC in processing claims. The reasoning is that if the defendants are allowed to deduct those costs in figuring the Town's loss, inefficient frauds will be penalized less

severely than efficient ones, because the costs subtracted from the proceeds of the fraud to determine the loss to the victim will be larger and the net proceeds therefore smaller. The government is correct that the fraudster's costs shouldn't be deducted, *United States v. Hausmann*, 345 F.3d 952, 960 (7th Cir.2003), any more than the costs of a burglar's tool should be deducted in determining the loss suffered by the victim of the burglary. The objective in calculating the loss inflicted by a crime is to determine how much worse off the victim was made by the crime, see, e.g., *United States v. Frost*, 281 F.3d 654, 659 (7th Cir.2002), and so the costs incurred by the criminal *to commit the crime* are irrelevant. But the qualification is vital, since the criminal may have expenses unrelated to the crime. That is the case here. Out of the total amount that the Town paid SRC, $33.8 million, SRC paid $22 million in legitimate claims and incurred costs to process them. Had the Town hired a legitimate claims processor, the price charged the Town by the processor would have reflected his costs. The loss to the Town on the legitimate claims was the difference between what it paid SRC to process them and what it would have paid a legitimate processor to process them. A defendant is entitled "to deduct from the loss calculation any value the defendant gave the victim at the time of the fraud." *United States v. Janusz*, 135 F.3d 1319, 1324 (10th Cir.1998).

*608 [15] The judge did this. But the government is right that having determined that the loss caused by the fraud was $10.6 million the judge should not have rounded this figure off to below $10 million, which reduced the length of the defendants' sentences. The judge's reason was that $10.6 million was merely an estimate, which might therefore be off--might indeed be off by $600,001. No doubt. But unless he thought the estimate biased, he had no basis for rounding down any more than he would have had for rounding up. Reasonable estimates are proper predicates for calculating loss. U.S.S.G. § 2F1.1 Application Note 9 (1997) (now § 2B1.1 Application Note 3(C)); *United States v. Bhutani*, 266 F.3d 661, 668 (7th Cir.2001);

United States v. Snyder, 291 F.3d 1291, 1295-96 (11th Cir.2002); *United States v. Carboni*, 204 F.3d 39, 46 (2d Cir.2000).

[16] This was error and ordinarily an error in a sentence requires resentencing. But not if the government would prefer the original sentences to stand than to take its chances with a resentencing that could result in lower sentences even after the error that the judge committed against the government (the rounding down) is corrected. If the defendants are resentenced, then since the guidelines are now merely advisory the district judge will not be strictly bound by the sharp line drawn by the sentencing guidelines between frauds that cause a loss of $9,999,999 and those that cause a loss of $10,000,000. Were he to decide that an estimate so close to the line did not, in the circumstances of this case, warrant the bump up in sentences that the guidelines decree at $10 million, and on that basis decided that the original sentences were proper, we would be unlikely to deem his action an unreasonable departure from the guidelines, and we would therefore have to affirm. This means that if, in a *Paladino* remand, the judge determined that he would have given the defendants the same sentences he imposed originally even if he'd known the guidelines were merely advisory, his decision would not be invalidated by the error that we have found. Those sentences would therefore stand.

[17] If, however, the judge is required to resentence the defendants because of the error he committed against the government, he may conceivably give them lower sentences, the guidelines no longer being mandatory. The question is whether the government wants to run that risk. One of us asked the government's lawyer at argument: "Do you want to pursue the cross-appeal after *Booker*? Of course, if you succeed on any aspect of the cross-appeal, instead of there being a limited *Paladino* remand, there will be a vacatur and a straight remand with instructions to resentence and, of course, at the resentencing, [the district judge] can give the very same sentence

he gave if not a lower one." To which the lawyer replied: "We've considered this very carefully, your honor, and we're prepared to take our chances. We are pursuing the cross-appeal." We interpret this to mean that the government wants the defendants resentenced--all but Bonnie LaGiglio, who, therefore, is alone entitled to a *Paladino* remand, pending which we retain jurisdiction of her appeal. We vacate the judgments of the other defendants and remand for resentencing.